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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 357

ATLANTIC GREYHOUND CORPORATION,
Petitioner,

vs.

WALTER HUNT, ADMINISTRATOR OF MARY ELLEN HUNT, JOSEPHINE HUNT, BY HER NEXT FRIEND, WALTER HUNT, LEROY HUNT, BY HIS NEXT FRIEND, WALTER HUNT, AND BOBBY WARREN HUNT, BY HIS NEXT FRIEND, WALTER HUNT
(Consolidated for Trial)

RESPONDENTS' BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RAYMOND KYLE HAYES,
North Wilkesboro, N. C.;
WM. M. ALLEN,
HOKE F. HENDERSON,
ALLEN & HENDERSON,
Elkin, N. C.;
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Statement of Facts

Four minor children of Walter Hunt were riding in the back seat of the Hunt car (R. 137) which had entered Highway 268 from the Traphill Road on the north (R. 26). The Traphill road was paved for a distance of 170 feet north of Highway 268 (R. 62, 63). The Hunt car, having entered the intersection, passed the center line of Highway 268, and

straightened up on the south side of 268 was struck by the petitioner's bus which was traveling west on its wrong or left side of the highway at an excessive rate of speed (R. 12, 13, 14, 157), hitting the Hunt car near its left rear fender and knocking it backwards some 60 feet off the highway to a point where it was stopped by a tree (R. 23, 24), resulting in the death of one child and serious and permanent injuries to the other three children.

These actions were brought on behalf of the children for the death and for injuries sustained in the collision. A jury from the Middle District of North Carolina, after having received proper instructions as to the law applicable to these cases by the able presiding Judge, Johnson J. Hayes, and upon the evidence of negligence of the petitioner, rendered a verdict in favor of the children to compensate them for their injuries.

Thereafter the petitioner appealed the actions to the Fourth Circuit Court of Appeals raising the same questions as are now presented to this Court in their petition for certiorari.

The negligence of the petitioner is clearly established by the uncontradicted evidence placing the point of collision at a gouged out place made by the left rear wheel of the car on the south side of Highway 268, near the center line of the Traphill Road (R. 25, 26, 27), with marks leading from the gouged out place some 60 feet backwards to the place where the car was stopped by a tree (R. 24, 27, 145). These physical facts connected with the fact that the Hunt car had first entered the intersection and that the bus failed to yield the right of way (R. 12, 152, 153, 158), the fact that the bus was being operated to its left side of the highway (R. 12, 13, 137, 153, 158), the distance the bus traveled after the impact, the excessive speed of the bus as is evidenced by the distance the Hunt car was knocked, further establish the negligence

of the petitioner as being the proximate cause of the injuries sustained.

The negligence of the petitioner as the proximate cause of the injuries was established by the evidence in the following respects:

1. That the car in which the respondents were riding was in the intersection first (R. 45, 46, 52); therefore, it was the duty of the petitioner to yield the right of way as provided by North Carolina Gen. St. 20-147.

2. That the bus failed to travel upon the right hand portion of the highway (R. 12, 158) as provided in N. C. G. S. 20-147-148.

3. In that the bus was speeding as shown by the distance the Hunt car was knocked backwards from the point of impact (R. 24), the testimony of the bus driver that he was picking up speed (R. 157) in violation of N. C. G. S. 20-141, and the testimony of Hunt and Dancy as to the speed (R. 13, 44).

4. That the petitioner did not have his vehicle under proper control and failed to keep a proper lookout as evidenced by the statement of the bus driver that he was approaching a known dangerous intersection with which he was familiar (R. 155), and as evidenced by the fact that the bus failed to turn to the right into the Traphill Road (R. 158) contrary to the provisions of N. C. G. S. 20-140 (Pet. Br. 15).

5. That the petitioner could have reasonably foreseen that an automobile might enter Highway 268 from the Traphill Road as the bus driver was familiar with the road, having traveled it daily for 30 days, and knew at this time church was going on opposite the mouth of the Traphill Road, and that he was in a zone in which three churches

were located, was approaching the intersection which he knew was dangerous where his view was obstructed; that he had shifted gears from second to third; that he was picking up speed; that he turned left into the Hunt car instead of turning right into the Traphill Road (R. 155, 157). These acts of the petitioner were contrary to N. C. G. S. 20-141.

From any of these acts of negligence the jury could and did find that such negligence of the petitioner was the proximate cause of the injuries received by the respondents; or that such acts were concurrent negligence which was a proximate cause of the injuries received by the respondents.

The physical facts refute the statement that the Hunt car came out of the Traphill road on the extreme left close to the eight foot bank for the gouged out mark testified to as the point of impact clearly showed that the Hunt car was near the center line of the Traphill road when struck by the bus. The evidence of Hunt that he had completed his turn was corroborated by the statement of Dancy, that while the bus was a length from the eastern edge of the Traphill road he saw the Hunt car in the middle of Highway 268 and about the middle of the Traphill road intersection. That Hunt was completely across the highway and had straightened up is corroborated by the marks on the highway made by the left rear wheel of the Hunt car. All the evidence clearly shows that the Hunt car was in the intersection while the bus was either the length of the bus away from the eastern edge of the intersection (R. 152) or was 20 to 25 feet away (R. 158).

The mouth of the intersection was 96 feet wide (R. 62); the imaginary center line of the intersection of the Traphill road with Highway 268 is 67 feet west of the eastern edge of the mouth of the intersection and 28½ feet east of the west-

ern edge of the mouth of the intersection (R. 67); the front end of the bus extended 2 to 4 feet westwardly of the imaginary center line (R. 28, 34); the bus was 34 feet in length; the gouged out mark made by the Hunt car was eight to ten feet under the rear of the bus; therefore, as a matter of calculation from the physical facts, the point of impact occurred 45 to 47 feet west of the eastern edge of the mouth of the intersection.

It will be seen from the foregoing statement of facts that every material fact was controverted and at issue before the jury, and the jury has rendered its verdict upon these facts. The Fourth Circuit Court of Appeals having thoroughly reviewed the entire case, there is no serious reason advanced by the petitioners to require the opinion of the Circuit Court to be disturbed.

Reasons for Denying the Writ

I

The entire argument of the petitioner is based upon the contention that Hunt's negligence intervened and insulated the negligence of the bus driver, and that the court should so hold, notwithstanding the verdict of the jury. The respondents contend that there is no evidence that the negligence of Hunt, if any, was the proximate cause of the accident. All of the specific acts of negligence of Hunt which are complained of by the petitioners were in direct conflict, none being definitely established by the petitioner.

In so far as the doctrine of insulating or intervening negligence is concerned in this State, our courts have held in case after case that this doctrine cannot be established except upon clear and undisputed, uncontradicted, or admitted facts.

As stated by the Circuit Court of Appeals (R. 167) "despite the evidence of Hunt's negligence and the fact

that Traphill road was servient, the question of whether there was negligence of the defendant which was the proximate or concurring cause of the accident was for the jury, under proper instructions . . ."

"This phrase of 'insulated negligence' seems established in North Carolina practice. See *Butner* v. *Spease*, 217 N. C. 82, 6 S. E. (2d) 808, and *Reeves* v. *Staley*, 220 N. C. 573, 18 S. E. (2) 239. Insofar as this doctrine depends upon uncontroverted facts, it is not here controlling because most of the material facts in this case were in controversy."

In *Butner* v. *Spease*, 217 N. C. 82, 6 S. E. (2d) 808, the Court at page 210 says: "Here the essential facts are not in dispute. The liability of E. A. Spease, the driver of the truck, is established beyond all peradventure. Was his negligence the sole proximate cause of the collision? This is the real question posed by the record." The Court further said, "This doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another really belongs to the definition of proximate cause."

In *Reeves* v. *Staley*, 220 N. C. 573, 18 S. E. (2d) 239, the court in its opening statement said, 'These facts appear to be uncontroverted."

In the *Butner* and *Reeves* cases *supra*, as pointed out by the court the facts were undisputed and in the other cases cited by petitioner in its brief on this question the facts appear to be so clear and admitted that only one inference may be drawn from them, whereas in the instant case every material fact was seriously controverted, which presented a question for the jury to decide what was the proximate cause of the injury.

In the instant case the trial judge pointed out that this was not an action between the driver of the Hunt car and the bus, but was brought by the respondents, and specifically instructed the jury (R. 110) "But it is your duty to consider

any evidence here that shows any negligence on the part of the operation of the Hunt car, any evidence of negligence on the part of the bus driver in order to determine whose negligence really caused the trouble. That it is your duty to decide whether the negligence of Walter Hunt alone caused it and if it did, the defendant should not be required to pay for it, but if he was guilty of negligence in one or in several respects that proximately caused the injury and if the defendant was guilty of negligence which also became a proximate cause of it, and one without which it would not have happened, then so far as these plaintiffs are concerned, they are entitled to look to the defendant to compensate them for their injuries."

The court also charged on the theory of concurrent negligence (R. 92 & 93). On pages 86 to 89 of the record, the court very fully instructs the jury as to the contentions of the bus company relative to the acts of the driver of the Hunt car, and specifically on page 88 the court instructed the jury that the defendant contended that it was not guilty of any negligence at all but that this accident was due to the sole negligence of Hunt.

The Supreme Court of North Carolina in cases handed down since the *Reeves* and *Spease* cases, *supra*, has stated the principle- of law which we submit are applicable to this case.

In *Caulder* v. *Gresham*, 224 N. C. 402, 30 S. E. (2d) 312, 313, the court says: "Where the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

In *Henderson* v. *Powell*, 221 N. C. 239, 19 S. E. (2d) 876 at 879 the court said "No negligence is 'insulated' so long

as it plays a substantial and proximate part in the injury. Restatement of the Law, Torts, Sec. 447. 'In order to relieve the defendant of responsibility for the event, the intervening cause must be a superseding cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury."

In the case of *Lancaster* v. *Atlantic Greyhound Corp.*, 219 N. C. 679, 14 S. E. (2d) 820, in a case involving an intersection accident the court holds: "If the defendant could base its theory of insulated negligence on clear and undisputed facts, showing the conduct of Crane, . . . to have been of the character which defendant ascribes to it, the defense might be worthy of more serious consideration. But there are difficulties in the way. Under the conflicting evidence upon the critical point at issue, we do not feel justified in taking the extreme view of the occurrence necessary to sustain defendant's contention. It would involve an assumption of facts which the jury, on the whole evidence, has obviously found to be otherwise.

"Instances in which active negligence, continuing to the moment of impact, may be insulated by intervening negligence must be comparatively rare. Such primary negligence is never insulated when it is obviously a substantial contributing factor. No doctrine of whatsoever kind ought to be mechanically applied against the reason of the thing.

"While the jury, if the issue had been before it, might have inferred from the evidence that Crane was negligent, the ultimate effect could have been no more than make him a joint tort-feasor with the defendant, and this, of course, would not alter the result of the trial."

In the trial of this action in the District Court, the only issue submitted to the jury, which was submitted without

for an issue as to intervening or insulating negligence was as follows: "Were the petitioners injured by the negligence of the defendant?"

Thus the theory of the entire trial was bottomed upon whether or not any negligence of the petitioner was the proximate cause of the injuries received by the respondents, and the jury, by its verdict, found that the petitioner was negligent in causing the injuries complained of.

There was no evidence of any new and independent cause breaking the sequence of events put in motion by the original negligence of the petitioner. As pointed out by the court in *Butner* v. *Spease, supra,* the doctrine of insulating negligence belongs to the definition of proximate cause and when the charge of the court is taken as a whole, we think that it properly and adequately instructed the jury as to the law of proximate cause arising from the facts in this action, and that it clearly and fully sets forth all of the contentions of the petitioner.

It is apparent from the decisions cited that the opinion of the Circuit Court of Appeals is in accord with the applicable decisions of the Supreme Court of North Carolina, and that the Circuit Court of Appeals has not decided a question of local law in conflict with the Supreme Court of North Carolina.

It is clear from the evidence presented in the instant case that it was one of concurrent negligence to be submitted to the jury upon instructions of proximate cause which the court properly and adequately did and was not one of intervening or insulating negligence.

II

As to this question, the petitioner did not request the court to charge that the violation of a safety statute was negligence per se nor did it object or except to the charge objection on the part of the petitioner and with no request

as given by the court (R. 108). The petitioner has overlooked the fact that this is an action brought by third parties to whom the negligence of Hunt could not be imputed. Assuming for the purpose of argument that the negligent acts of Hunt complained of by the petitioner to be negligence per se, the proof must go further and show that these acts were the sole proximate cause of the accident. In this case the ultimate effect could have been no more than make Hunt a joint tort-feasor with the defendant, and this, of course, would not affect the result of the trial, the jury having found that the negligent acts of the petitioner were a proximate cause of the injury.

III

In conclusion the respondents contend that petitioner made no specific object nor exception to the charge of the court as given, nor was any specific objection or exception interposed to the failure of the court to give any special instruction requested.

Rule 51 of the Rules of Civil Procedure provide- in part "no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections." See also Supreme Court Rule 8.

The record fails to disclose that the petitioner at any time made any specific objection or exception to the charge of the court as given and of which he is now complaining nor does it disclose that the petitioner at any time made any specific objection or exception to the failure of the court to give any of the special instructions of which he is now complaining.

In *Palmer* v. *Hoffman*, 318 U. S. 109, 119; 63 S. Ct. 477, 483, the Court said: "In fairness to the trial court and to

the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. (Citing authorities) That long standing rule of Federal practice is as applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge.

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be denied.

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APPENDIX

The following sections are part of Chapter 20, Motor Vehicles of the General Statutes of North Carolina:

Section 21-141. Speed restrictions.

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

"(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

• • • • • • •

"2. Twenty-five miles per hour in any residence district;

• • • • • • •

"(c) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care. It shall be unlawful to violate any provision of this section, and upon conviction the violator shall be punished as provided in Sec. 20-180."

Section 20-147. Keep to the right in crossing intersections or railroads.

"In crossing an intersection of highways or the intersection of a highway by a railroad right-of-way, the

driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right side is obstructed or impassable."

Section 20-148. Meeting of vehicles.

"Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible."